What Board Members Should Know About Reviewing a Form 990
By Emily Chan and Gene Takagi, NEO Law Group
Winter 2012 issue of BoardLink

The redesigned Form 990 (the IRS annual information return for certain exempt organizations) released in 2008, marked a new era of increased IRS inquiry into governance-related matters of exempt organizations. Although almost four years have passed since the Form 990 underwent this major facelift, two questions continue to pose challenges and raise uncertainties for many organizations and their boards of directors:

1. Has the organization provided a complete copy of this Form 990 to all members of its governing body before filing the form?
2. Describe in Schedule O the process, if any, used by the organization to review this Form 990.

While federal tax law neither mandates nor provides instructions regarding the board's duty to receive a Form 990 or to have a Form 990 review policy, disclosures on the Form 990 indicating that board members do not receive the Form 990 before filing and/or do not review the form at any time may be perceived as a significant weakness of the organization. With today's increased demands for transparency and accountability in the nonprofit sector, exempt organizations and their boards cannot underestimate the value in proactively and properly addressing these questions.

Providing a copy to the board prior to filing
The Form 990 first asks if a copy of the final version of the Form 990 was provided to each board member before it was filed. While an affirmative response may not provide much assurance that the board is active in its oversight (as this question does not ask whether any board member who received a copy actually reviewed the form either before or after filing), a negative response may be perceived as an indicator of weak board oversight. Thus, although board members may fear that a requirement for the board to receive the final Form 990 prior to filing may result in increased personal exposure (especially if the form contains a misrepresentation or evidences the organization's failure to comply with applicable laws), they should be more concerned about the potential claims or appearance of poor governance associated with choosing to forgo the receipt of this critically important and widely available public document.

Developing a Form 990 Review Policy
The Form 990 next asks for a description of the process, if any, the organization uses to review its Form 990. Given the increasing importance of the Form 990 to authorities, stakeholders and media, organizations are strongly encouraged to develop a policy to help ensure the Form 990 becomes an asset, not a hindrance, to the organization.

Initially, the board should identify areas that deserve extra scrutiny such as those related to the organization's mission and significant activities, financial health, executive compensation, insider transactions, types of expenses (e.g., administrative, fundraising, programmatic), unrelated business activity, relationships among board members and officers, and lobbying and electioneering activity.

Next, the board should strategically identify the various individuals or groups who will be responsible for reviewing the Form 990. While all board members may want to generally review the organization's Form 990, in part as evidence of meeting their fiduciary duty of care, it may be advantageous to have a more manageable-sized board committee tasked with a critical review. Such committee, if carefully chosen and sufficiently prepared, may provide important
feedback in the final preparation of the Form 990 and relay pertinent information back to the full board. It’s not uncommon for boards to delegate these duties to the audit committee. But since its 2008 redesign, the Form 990 has become much more than a financial report.

Accordingly, the extensive narratives, particularly of program service accomplishments and changes in activities, are some of the key areas that should be reviewed by those individuals who are most familiar with the organization’s programs and/or have experience with fundraising, marketing, and public relations.

Finally, boards should take note the Form 990 can easily be scrutinized by third parties, and criticism can spread quickly regardless of its validity. Therefore, it may be helpful to charge one or more persons on the reviewing body to look specifically for weak points in the Form 990 prior to filing. Such weak points may be mitigated by, among other things, providing additional context or an explanation of the steps the organization has since taken to address those weaknesses.

Although the Form 990 can be intimidating at first blush, its coverage of financials, programmatic achievements, executive compensation, and governance policies should be familiar territory for a board. Organizations that engage and educate their board members about the Form 990 will benefit from more constructive feedback that in turn results in a public document that best reflects the organization and its values.